## "LAST CLEAR CHANCE."

Probably the best exposition of the doctrine of the last clear chance is set out in the case of *Bogan* v. *N. C. C. Ry. Co*, reported in 129 N. C. 154, and it is prominently referred to on account of the facts involved, as conveying an object lesson, as well as the able opinion of Judge Douglas. The plaintiff, Mrs. Bogan, was injured by being struck by a railroad train while she was walking upon the railroad company's trestle, from which she was unable to entirely escape on account of the limited width of the structure. The facts show that the lady was a wrong-doer in a double sense, (1) in that she was upon the trestle at all, and (2) "that she was accompanied in such a dangerous place by a young man whom she afterwards married and in whom she was deeply interested." Indeed, "the defense contended that their going upon the trestle in such a frame of mind was negligence *per se*." "The learned counsel for the plaintiff seems to tacitly admit this proposition," says Judge Douglas, "but contends that, by the exercise of ordinary care, the defendant railroad company could have prevented the injury, notwithstanding the great negligence of the plaintiff." And, in view of the fact that the jury so found, the Supreme Court of North Carolina placed the "last clear chance" with the railroad company and held it responsible in the following apt but unsentimental words: "This court should not deny to a young bride expectant the protection which the English Court of Exchequer extended to a hobbled donkey browsing in the public higwhay." It is clear from this speech that the North Carolina court rested its decision upon the well-known English case of *Davies* v. *Mann*,[1] in which the owner of a donkey that had been hobbled and turned upon the public highway to graze, was allowed to recover from one who negligently ran into and injured the donkey. This is about the first case. The doctrine was there laid down in the following words: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." The doctrine would seem not an abrogation of the rule of contributory negligence, nor permission for one to recover in spite of his contributory negligence, but the negligence of the plaintiff is negatived and lost sight of by vir-

[1] 10 M. & W. 546.

tue of the subsequent intervention of the defendant's negligence, without which the accident could not have occurred, regardless of plaintiff's negligence, which negligence becomes a fact too remote to be a factor, under the new condition so suddenly arisen. This is forcibly shown in the North Carolina "Trestle Case," where the engineer might have, by stopping his train (which it was shown he could have done after learning of plaintiff's peril), prevented the injury. His negligence in not stopping, thus intervened between that of the plaintiff, in going upon the trestle, and the accident, and naturally becomes the sole proximate cause of the injury, rendering the plaintiff's negligence as remote and, therefore, under the decisions, not contributory. *Troy* v. *Cape Fear, etc. Ry Co.*[2] A good definition of proximate cause may be found in *Watts* v. *So. Bell Co.*;[3] in *Folkes* v. *So. Ry.*,[4] and in *Herring* v. *C. & W. Ry. Co.*[5]

See 9 Va. Law Reg. p. 734, *et seq,* and cases there cited, with editorial note, for measure of defendant's liability. For concurrent negligence of plaintiff and defendant, see *Richmond &c. Co.* v. *Martin,*[6] and *Consumers' Co.* v. *Doyle.*[7] A good case of "independent intervening cause" is *Cole* v. *German Sav. & L. Soc.*[8]

It appears, therefore that the doctrine of the "last clear chance" is based upon humanity, hard common sense, "stands upon its own bottom," and is not in conflict with the well-established rule of contributory negligence.

It is perfectly clear, however, that both parties must have been negligent, and it follows that the plaintiff necessarily contributed to the accident, but under the conditions required by the doctrine, his sin becomes *nil* and is wiped out just so soon as the defendant steps in, fully possessed of the means to prevent the accident, notwithstanding plaintiff's negligence, and negligently fails to do so. In Virginia (*N. & W. Ry.* v. *Perrow*),[9] it was said "a plaintiff, though negligent, is not barred from recovery unless his negligence in some way contributed to the injury complained of."

It follows that "plaintiff's negligence must not have continued up to the time of the accident, or at least as long as the defendant's negligence." After the beginning of this new status no more negligence must be imputable to the plaintiff." "He must exercise

[2] 99 N. C. 298, 6 S. E. 77.
[3] 101 Va. 45.
[4] 96 Va. 742.
[5] 9 Va. Law Reg. 534.
[6] 9 Va. Law Reg. 807.
[7] 9 Va. Law Reg. 1078.
[8] (C. C. A., 8th C.) 63 L. R. A. 416.
[9] 101 Va. 345.

prudence." In *Joyner's Case*[10] it was said: "The company cannot wilfully injure a trespasser, but its duty to protect him arises when it has notice or reason to believe that he is in danger." In *Green* v. *So. Ry.*[11] the doctrine in the *Joyner Case* is discussed and approved, Keith, P., and Cardwell, J., dissenting upon the facts.

In a recent case (*Harrington* v. *Los Angeles Ry. Co.*),[12] in California, it was said "that a person who has negligently placed himself in peril and negligently fails to discover that fact does not relieve one who, knowing of the peril, negligently injures him, from the operation of the rule that the one having the last clear chance to avoid an injury is liable for it." The facts in the case are also peculiar, in that plaintiff's negligence presents a double aspect. He was engaging in rapid bicycle riding on the public streets, contrary to law, and was thereby guilty both of the breach of an ordinance by racing upon the street and negligently and rapidly crossing a street car track where cars constantly ran. But see *Ches. Ry. Co.* v. *Jennings*.[13]

"The rider, upon discovering the approach of the car running at about two and one-half to four miles an hour, attempted either to pass in front of the car on the western side of San Pedro street or to turn up Ninth street (he could not stop), and in so doing collided with the right-hand front corner of the car and was killed. The deceased was violating an ordinance (by racing) and was consequently guilty of negligence, without which, undoubtedly, the accident would not have occurred." "There was evidence warranting the jury in finding that the motorman, who confessedly knew that the bicycle race was then in progress on San Pedro street; was warned by numerous bystanders before he had reached the easterly line of San Pedro street that the racers were coming; that some stood on the track in front of the car endeavoring to stop it; he, nevertheless, continued and saw the racers approaching under a speed they could not check; that after seeing them he could easily have stopped his car before it reached the path along which the bicyclists were proceeding and thus have insured absolute safety to the riders. On the contrary, he pushed his car ahead, and the accident occurred." The rider's negligence is doubly apparent. The motorman's negligence, intervening between that of the rider and the accident, was, in the light of what has been said, clearly and

[10] 92 Va. 354.
[11] 47 S. E. 819.
[12] 140 Cal. 514.
[13] 98 Va. 70.

solely the cause. Had the motorman been careful the rider's negligence would not have resulted in the accident.

PLAINTIFF'S SUBSEQUENT CONDUCT.

But, on the other hand, the plaintiff's conduct after discovering his peril was a factor in the recovery and should be considered. The court said: "There was also ample evidence to justify the jury in finding that immediately upon discovering his dangerous position the deceased exercised reasonable care in endeavoring to avoid injury." As to burden of proof, see *Richmond &c. Co.* v. *Allen;*[14] *Watts* v. *So. Bell Co;*[15] but see *Richmond* v. *Hudgins.*[16]

It would appear that in every case to which reference is made, as well as the text-books, that past contributory negligence is not considered, but is wiped out at and from the point where the defendant, by proper conduct, could have avoided the injury; that the burden at that moment shifts to the defendant, and plaintiff is allowed to make a fresh start, as it were. Afterwards, "he must exercise reasonable care to avoid the injury" under the new circumstances and "to avoid the consequences of negligence ascribed to another."[17] But see *Snyder* v. *Philadelphia Co.* (W. Va.),[18] for a very full and able discussion of proximate cause. Defendant was held liable for frightening horses, causing them to run away, by blowing the water from a gas well, although the injuries received by the driver (the plaintiff) were occasioned by his fall from the vehicle, the fall being brought about by a faulty rein that broke. Neither the horses, wagon or load were injured. The frightening of the horses was declared the proximate cause. It seems that the driver might have avoided the consequences by having sound harness—certainly a reasonable care and precaution.

REASONABLE CARE.

But what is "reasonable care" under such trying circumstances? It has been said[19] that "no rule sufficiently elastic to meet the requirements of the varying circumstances which influence the conduct of those menaced by sudden danger can be formulated. The 'prudent man,' so often set up as a model and standard of comparison, is phlegmatic, conservative and farsighted, but he acquires these and other excellent attributes in circumstances which admit of mature deliberation. What his conduct would be if the opportunity

[14] 101 Va. 200.
[15] 100 id. 45.
[16] 100 id. 409.
[17] Danville St. Car Co. *v* Watkins, 97 va. 713.
[18] 63 L. R. A. 899.
[19] Barrow on Negligence.

for such deliberation were lacking, is purely a matter of conjecture. All definitions of ordinary or proper care, as effecting contributory negligence, are misleading and unsatisfactory." In the "bicycle case," above referred to, the fact that the companions of the rider were not hurt was used as an argument by the defense, but the court said "the fatal result and the escape from serious injury of the others is in no sense determinative of the question as to whether he used such reasonable care, for, as has been well said, it is always easy after an accident to see how it could have been avoided; but a man's duty *before* the calamity is not measured by such *ex post facto* information." The court seems to have greatly reduced the degree of care and prudence in such cases and measured it in these words: "It must be remembered that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." See also in this behalf *Danville Ry.* v. *Hodnett*,[20] and *Richmond Ry. Co.* v. *Hudgins*.[21]

"*The reasonableness of his effort*" to escape the injury after discovering it, whatever the result, seems to be admitted by all the authorities as the only thing for the jury to consider.

DEFENDANT'S RESPONSIBILITY.

Can defendant claim immunity on account of the negligent failure of his opponent to discover his own danger resulting from his own negligence? It seems not, if defendant had knowledge of plaintiff's danger. This defense, however, has been earnestly championed. "But," said the court in the "bicycle case" (*supra*), "in such a case, he who knows of the danger (to plaintiff) and recklessly proceeds regardless thereof, can find no refuge in the fact that the injured party who does not know of it, would have known if he had used reasonable care to ascertain it." The court then proceeds to give a succinct reason for the doctrine of the "last clear chance" in these words: "In such a case, he who knows of the danger and can avoid it, as against one who does not *in fact* know thereof, has the last clear opportunity to avoid the accident." It will be observed that the plaintiff's contributory negligence pales into insignificance in the light of the greater duty of the defendant to protect him upon becoming conscious of plaintiff's danger, or of

[20] 101 Va. 361.

[21] 100 id. 409.

facts which should cause him to see it,[22] which is really the foundation of the doctrine.

PRESUMPTION OF SAFETY.

But there is another feature of defense. Has not the defendant, "where the circumstances are such that he has the right to assume that the other party can and will protect himself," the right to act upon that presumption without liability? In the first place, this rule would cheapen human life, and, in the second place, it would require a high degree of intelligence, composure and prudence to measure the chances in order that great harm be not done. This has been ably contended for in several cases, but the rule seems to be, that "it is enough that the circumstances of which the defendant had knowledge are such as to convey to the *mind of a reasonable man a question as* to whether the other party will be able to escape the threatened injury." [23] It is not a matter of judgment or opinion. The simple "question" of danger is sufficient. In fact, the issue has been squarely met in these words: "This does not mean, as seems to be contended, that defendant *must know* that injury is inevitable if he fails to exercise care and the decisions indicate no such requirement." [24] It is the *circumstances* of which defendant had knowledge "which should put him upon notice." In which will be observed the application of an old and familiar doctrine of implied notice. See also *Richmond* v. *Allen*.[25]

This should be read in the light of *Everett* v. *Los Angeles Ry. Co.*,[26] "where the injured party is discovered in time, lying or standing on a railroad track under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is even attempting either on foot or otherwise to make a crossing or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible." This, of course, is aside from wilful or wanton negligence, for "where an act is done wilfully and wantonly, contributory negligence upon the part of the injured person is no bar to a recovery.[27] See also *Joyner's Case*.[28] "The company cannot wilfully injure a trespasser, but its duty to protect him arises when it has notice *or reason to believe that he is in*

[22] Richmond &c. Co. v. Gordon, 10 Va. Law Reg. 111.
[23] Harrington v. Los Angeles Ry., 140 Cal. 514.
[24] Harrington v. Los Angeles Ry., 140 Cal 514.
[25] 101 Va. 204.
[26] 115 Cal. 105 (46 Pac. 889).
[27] N. & W. Ry. v. Perrow, 101 Va 345.
[28] 92 Va. 354.

*danger.*" It is not a question of what defendant believes, but what he "had reason to believe." And the words of Mr. Beach might be added:[29] "When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as a result of his negligence, there is a very little room for a claim that such conduct on his part is *not* wilful negligence." The cases above referred to, however, as has been shown, did not rest upon wilful negligence, but upon the humane principle (1) that the man who really has the last clear chance will be required to use it, (2) whether he knew he had it or not, if the circumstances are such that he should have known,[30] and though his opponent negligently or otherwise failed to realize his imminent danger—the only condition as to him being that he does not contribute further of his negligence.

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[29] Beach on Negligence.

[30] Gordon's case, *supra.*